

Council on Worker's Compensation  
Meeting Minutes  
Madison, Wisconsin  
May 13, 2003

Members present: Mr. Bagin, Mr. Beiriger, Mr. Buchen, Ms. Connor, Ms. Huntley-Cooper, Mr. Kent, Mr. Newby, Mr. Olson, and Ms. Vetter

Staff present: Mr. Conway, Mr. O'Malley, Ms. Knutson, Mr. Krueger, Mr. Shorey, and Mr. Mitchell

1. **Call to Order.** Ms. Huntley-Cooper convened the meeting in accordance with Wisconsin's open meeting law.
2. **Minutes.** Mr. Newby moved adoption of the minutes of the April 22, 2003 meeting; Mr. Bagin seconded the motion. The motion was unanimously approved.
3. **Discussion of Wis. Nurses Assn. Proposal.** The Wisconsin Nurses Association proposes that Advanced Practice Nurse Prescribers (APNP) be considered treating practitioners under Wisconsin worker's compensation law. Mr. O'Malley explained Wis. Stat. §102.42(2) provides the employee has the choice of any physician, chiropractor, psychologist, dentist or podiatrist licensed to practice and practicing in this state for treatment of the work injury. In addition, Wis. Stat. §102.17(1)(d) lists practitioners that have the competency to render opinions. While dentists are listed as treating practitioners, their competency to render opinions is limited to diagnosis and the need for treatment, not an opinion on disability (i.e. whether the medical condition/injury is work-related or the extent of disability). Mr. Newby indicated that two issues are involved in this proposal: allowing payment for treatment rendered to injured workers by APNPs and whether they should be allowed to render opinions in worker's compensation cases. Mr. O'Malley reiterated that opinions on "disability" involve both opinions on work-relatedness and extent of disability.

Ms. Patricia Udelhofen, APNP indicated that she is a registered nurse with 24 years experience. She has a master's degree, is certified in a specialty and has completed examinations by the nursing board to be licensed. She is required to complete continuing education courses including pharmacology. She indicated that APNPs were first recognized in Wisconsin law in 1994. APNPs work in collaboration with physicians. However, APNPs are not listed in the worker's compensation statutes as practitioners. The Wisconsin Nurses Association requests that Wis. Stat. §§102.42(2) and 102.17(1)(d) be amended to specifically include APNPs as treating practitioners. Many times APNPs complete WKC16B forms without any questions from insurers, and receive payment from insurers for treatment rendered to injured workers. Ms. Udelhofen is in full-time practice at the Monroe Clinic. She may see a patient on an

urgent basis, or she may be the patient's primary care provider. She refers patients for further treatment if necessary. If APNPs are not included as providers, there are delays in receiving treatment or the patient receives care in an emergency room or urgent care facility at a higher cost. In her community, there is no other immediate care option. She carries her own malpractice insurance. Ms. Udelhofen indicated that the worker's compensation statutes need to be updated to include APNPs. Physician's Assistants (PAs) also want to be included as practitioners under Wisconsin worker's compensation law; they face the same challenges as APNPs. PAs are supervised by physicians and APNPs support their inclusion in the statutes as well.

Ms. Lynn Green, APNP, indicated that she has been a practicing nurse for 10 years. She specializes in occupational medicine. She cares for worker's compensation patients on-site for companies. She treats acute and repetitive injuries. She refers patients to an orthopedic physician if necessary. APNPs are currently rendering care to injured workers, and the patient can get caught in the middle if the insurer refuses to pay for the treatment.

Ms. Janice Lindsay, APNP, works for Dean Clinic in a rural clinic setting. She has experience providing both urgent care and occupational medicine. She stated that sometimes worker's compensation insurers are reluctant to pay for her services.

Mr. Bert Wagner, legal counsel for the Wisconsin Nurses Association, explained that APNPs are required to have an advanced degree, complete a pharmacology course, and have malpractice insurance. The Board of Nursing authorizes APNP as a separate category of nurses. They provide a broad range of services from occupational medicine to family practice.

Mr. Bagin inquired about supervision of an APNP by a physician. Ms. Udelhofen indicated that her licensure requires a written collaboration agreement with a physician. The physician knows her practice and is a resource and referral point for her. The physician does not supervise the APNP or sign off on notes or prescriptions. An APNP could have a stand-alone clinic as long as there is a documented relationship with a physician. Mr. Buchen inquired whether a physician would need to be part of the clinic. Ms. Udelhofen responded that an APNP could be in an independent clinic, but usually they are in the same clinic as the collaborating physician. Mr. Buchen inquired concerning the distinction between a nurse practitioner and an APNP. Ms. Udelhofen responded that Wisconsin statutes specify credentials for an APNP including a masters degree and national certification. A nurse practitioner does not take the national examination and the pharmacology course. Ms. Green indicated that an APNP can prescribe medications, order laboratory tests, and render a diagnosis. Mr. Buchen inquired regarding the scope and rules of practice of APNPs versus nurse practitioners. Mr. Wagner responded that the Board of Nursing recognizes and licenses a select number of specialty nurses including nurse anesthetists, midwives, nurse practitioners and APNPs. The legislature defined specific credentials for APNP. Mr. Beiringer questioned whether it was necessary for APNPs to make disability and liability

determinations. Ms. Udelhofen responded that APNPs want to be included in the provider listing in Wis. Stat. §§102.42(2) and 102.17(1)(d), so that their documentation would be accepted the same as that of a physician. They are not asking to perform independent medical evaluations. Ms. Green indicated that APNPs rely on physical therapists to perform functional capacity assessments. However, they do assess permanent partial disability ratings according to Wis. Admin. Code §DWD 80.32, especially with reference to minimum disability ratings. Mr. Bagin questioned whether APNPs are completing WKC16B forms and whether insurers were challenging them. Ms. Green responded that she does complete the forms and was challenged on one occasion, but later the carrier accepted the rating. Ms. Udelhofen indicated that the specialty of APNP did not exist when the worker's compensation statutes were last amended to include dentists. She emphasized PAs and APNPs constitute a large group of practitioners in Wisconsin (500 to 600 APNPs) that were providing primary care to patients. Mr. Buchen questioned whether the scope of practice of an APNP was broader than that of a PA. Ms. Udelhofen explained that in her situation, her specialty is family practice. Admitting patients to the hospital is not within her license. Ms. Huntley-Cooper asked what happens to patients if there is no doctor or APNP in the rural community. Ms. Udelhofen explained, in that event the patient is forced to seek treatment at the emergency room or must travel to the next community. Registered nurses and occupational health nurses do not have the same credentials as APNPs. Ms. Vetter questioned when an APNP would seek the assistance of a physician. Ms. Green indicated that chest/shoulder pain would be referred to a cardiologist. Ms. Udelhofen indicated that she would refer a fractured wrist to a physician to be set. Mr. Buchen questioned whether the scope of practice of APNP's was defined by administrative rule. Mr. Wagner responded that the scope of practice was defined by the APNP's education, not by administrative rule. Mr. Bagin questioned whether treatment and charges by APNPs are paid by Blue Cross/Blue Shield. Ms. Udelhofen replied that that charges for APNPs are paid by Medicare, Medicaid, many insurers and HMOs. Most carriers define treatment by APNPs in the policy as covered care. Ms. Huntley-Cooper commented that several APNPs sent letters of support to the Advisory Council.

Ms. Alice O' Connor, Wisconsin Medical Society indicated that the Wisconsin Nurses Association assured her their proposal would not result in an expansion of their scope of practice. However, she expressed concerns regarding this issue, including malpractice, and fragmentation of the health care system. Ms. O'Connor indicated that the licensure board should address this issue. In addition, that it was late in the agreed bill process to consider this proposal. Physicians are in the best position to consider a variety of treatment options for patients. If injured workers are misdiagnosed, they will be out of work much longer. Ms. O'Connor suggested that the Advisory Council organize a committee over the course of the next year to study issues in connection with this proposal. Mr. Newby commented that none of the Council members are familiar with the certification processes for APNPs or PAs. He questioned why the Dept. of Regulation and Licensing is not making any recommendations on this proposal. Ms. O'Connor responded that whenever there is a discussion concerning expansion of the

scope of practice of any group, the issue usually proceeds through the licensure board. Patients' safety and liability issues must be considered. The physician has the ultimate responsibility in a collaborative agreement with an APNP. There are lower limits for malpractice insurance for APNP in comparison to physicians. Mr. Buchen commented that whether the patient is injured at work or at home, the medical care is the same; APNPs are just seeking to be paid under the worker's compensation system. Mr. Bagin drew attention to the fact there is an exception in the statutes for dentists. They can treat patients and render diagnoses, but cannot render opinions on work-relatedness and extent of disability. Ms. O'Connor stressed that this proposal needs more discussion. She further indicated that PAs must also be considered in this matter. She emphasized that this issue should start at the licensing board. Finally, she indicated that physicians speak highly of both APNPs and PAs. Mr. Newby asked whether the insurance carriers had a position on this issue. Ms. Connor stated that Wausau Insurance will pay the medical expenses for APNPs and PAs, but will not accept their opinions on causation or permanent partial disability. Mr. Olson said that some companies challenge payment, but not Sentry Insurance. Ms. Green commented that bills are sometimes challenged, but are paid as long as the services are within the scope of practice. She may prescribe medications as long as it is within her scope of practice. For example, if her practice primarily involved occupational medicine, she would not prescribe beta blockers generally within her scope of practice. APNPs are required to have continuing education yearly on pharmacology. She emphasized that the request was to change the language of the statute to reflect what was happening already in practice. Ms. Connor commented that the issue was not really one of payment, but the ability of an APNP to rate disability.

Mr. Bagin asked Ms. O'Connor to state her position on the proposal to have a department form for release of medical records. Ms. O'Connor responded that the Wisconsin Medical Society is in favor of streamlining the process to release medical records. If a patient does not want the medical information released, the doctor will not release the information. However, release of all records, even those unrelated to the work injury may be overkill. Mr. Buchen expressed concern that unqualified persons at the clinic will make the determination as to which records are related.

Mr. Dick Faust from the Wisconsin Academy of Physicians Assistants indicated that he had 23 years experience as a physician's assistant (PA). His scope of practice is not effected by this proposal. Most other legislation refers to qualified providers which include PAs and APNPs. He has a good working arrangement with qualified providers. Mr. Faust has a bachelor of science degree and a Master of Physician Assistant Studies

degree from the University of Iowa Medical School. At this clinic, all his dictated notes are reviewed by a doctor even though the law only requires a review and sign off if medication is prescribed. All signatures are done electronically. Mr. Lou Falligant from Dean Health System indicated that he was not sure if the collaborative language for APNPs exempt them from general physician's supervision. Dean Health System requires general supervision of both APNPs and PAs with sign-off on chart reviews.

The problem for APNPs and PAs is that insurers say they are not on the provider list and are therefore not an approved provider under worker's compensation law. He provided a copy of a letter from Mendota Mental Health. Mr. Falligant indicated that employees are given that letter from their employer and are told to take it to the clinic. If they are seen at the clinic by a PA or an APNP, the bill will not be paid and the off-work slip will not be honored. The employee would then need to return to the clinic to have the doctor sign the slip. This is an episodic problem with employers and insurers. Adding PAs and APNPs to the list of providers would fix this problem. A delay in treatment could effect the outcome of the work injury. Mr. Bagin questioned the CPT codes used by PAs. Mr. Falligant explained that the same codes used by physicians are used by PAs.

Mr. Newby suggested that the WCAC receive advice on this issue from the Division Legal Bureau and from the Dept. of Regulation and Licensing. Mr. Bagin indicated that perhaps forming a subcommittee would allow the Council to gather additional information. Mr. Newby indicated that at this point he was not sure if a subcommittee was needed. Once advice was obtained from the Dept. of Regulation and Licensing, if the issue becomes complex, then a subcommittee could be formed. Mr. Falligant indicated that the same attorney represents both the nursing and medical boards. Mr. Buchen indicated that two separate issues were involved in the proposal: compensation for treatment provided; and determining disability. The Council may decide to deal with these two issues differently. Mr. O'Malley indicated that possibly Mr. Wayne Austin, legal counsel for the Dept. of Regulation and Licensing, could attend the next Council meeting. Mr. Falligant indicated he could consult with Mr. Austin regarding the scope of supervision provided to APNPs by physicians.

**4. Determination of "Agreed Bill" Content:** Mr. O'Malley provided an update on the Department proposals. The Department drafted language to conform to the changes suggested by the Council. (The comments below relate to the Department proposal number.)

1&2. A minimum of \$25 in dispute for reasonableness of fee and necessity of treatment disputes. If treatment has ended and the dispute amount is under \$25, the provider is not prohibited from filing the dispute. Charges could be bundled together. Ms. Connor questioned how the Department will know the treatment has ended. Ms. Knutson replied that the Department can add a line and check-box on the bottom of the dispute resolution forms and the provider could affirmatively indicate that treatment had ended. The Council unanimously agreed to the proposed language, with no sunset provision.

3&4. At the last meeting, the Department requested a total of 90 days to correct errors in necessity of treatment and reasonableness of fee orders, but 60 days was agreed to by the Council. A sentence was added to the statute to provide that the Department has an additional 30 days to reconsider its order on grounds of mistake. Typically these situations involve service on the wrong carrier or the

wrong amount is order paid. The Council unanimously approved this proposed language.

6. This Department proposal provides that if self-insured employers and insurance carriers fail to respond to correspondence, the Department may impose forfeitures. This is a companion proposal to #9, which increases the forfeiture amounts. Mr. Shorey clarified that failure to respond to correspondence refers to an issue separate from failure to file reports. The Council took no action on this proposal.

7. This proposal involves an amendment to Wis. Stat. §102.32(6). Attorney Philip Lehner and Attorney David Weir drafted language that also requires changes to the administrative rules (probably creating §DWD 80.52). The Department has no objection to the proposed language. The Council unanimously agreed to the proposed language change.

9. The Department provided the Council with several different options for language changes. Mr. Bagin expressed concern with increasing the maximum penalty amount by five times. The maximum amount of \$500 may become the standard penalty over time. The Department is issuing rescissions at the rate of 70%. Worker's compensation is a no-fault system. Mr. Bagin would rather see the problem fixed rather than increasing penalties. Repeat offenders should be dealt with appropriately. Mr. O'Malley clarified that enforcement authority is through the Office of Commissioner of Insurance (OCI). OCI has imposed some sanctions against carriers in the form of fines. Mr. Bagin is concerned that forfeitures will be passed through to premiums. Answering correspondence results in costs to carriers. Correspondence is sent in the Department, but a forfeiture is still issued. The carrier must prove that the information was initially filed. A penalty of \$500 will not effect recalcitrant offenders. The employee is not getting the money from the forfeitures. Mr. O'Malley clarified that the money from forfeitures is deposited in the school fund. Language option #3 provides for a graduated penalty based on percentage of compliance for individual carriers. The performance rating is based on critical indicators. Mr. Newby commented that the amount of the penalty has not changed since 1931. Mr. Bagin reiterated concerns that the penalty would be passed through to the employer. OCI should not allow frequent offenders to write insurance in Wisconsin. Mr. Bagin indicated that the Council needs to focus on the mission of the Department. The Council does not react to one incident, but to a series of them. Mr. Bagin indicated that he would look at the different language options proposed by the Department. Mr. O'Malley clarified that the rescission rate is high because the Department is not receiving information from carriers, and then later the carrier states that the claim is not compensable. Mr. Bagin responded that sometimes carriers send in information up to three times and the Department indicates that it was never received. Mr. Conway commented that while there has been improvement in carriers and self-insured employers providing required information in the last

year, it is still a significant problem. Increasing the forfeiture amount will make carriers take notice and increase the response rate. Mr. Olson indicated that even if the forfeiture is rescinded, there is the time and expense involved in getting it rescinded. Mr. Bagin commented that if the forfeiture amount is increased to \$500, carriers will request a hearing which will result in increased litigation. Mr. Bagin indicated that he had no objection to part (b) of the proposal, just part (a). Mr. Bagin expressed concern that a claim is paid and then the insurer is fined for not properly documenting payment. Mr. Shorey responded that a \$500 forfeiture would not be imposed for a first offense. Mr. Newby suggested that Mr. Bagin further discuss this proposal with the Department. Mr. Bagin agreed to further discussions with the Department.

10. This proposal to amend DWD 80.02(2)(b) involves the requirement that the carrier or self-insured employer file a WKC-13 on a claim if the injury was initially reported. The Council unanimously agreed to the proposal.

12. This proposal would create a new provision in DWD 80.02 concerning notice requirements to an employee following receipt of notice of an injury. The Department's original proposal included a 45-day notice requirement, which has been reduced to 30 days. The notice would be sent to the employee only, not the Department. Mr. Newby observed that some language was inadvertently dropped in section 2 from the first draft. Also, the Council has requested language that required specific reasons be given for the denial. Mr. O'Malley indicated that the changes would be made and submitted electronically to the Council.

13. This proposal involves an amendment to DWD 80.02(3m), which allows the Department to require electronic reporting. The Department would focus on specific reports and included language for a waiver provision. The Council unanimously agreed to the proposed language.

14 & 15. The Department drafted language to amend DWD 80.72(3)(a) and 80.73(3)(a), which follows the time periods in the current rules respectively. The carrier or self-insured employer is required to provide notice to the provider when there is a liability or extent of disability (or liability) dispute. The Council unanimously agreed to the proposed language.

Mr. Newby requested clarification on a few management proposals. Mr. Bagin explained that management was more concerned with application of professional guidelines to the administrative law judges (ALJs) rather than imposing the Code of Judicial Ethics per se. Mr. Kent commented that the Supreme Court may need to be involved if the Council was contemplating imposing the Judicial Code of Ethics on ALJs. Mr. Conway indicated that he spoke with Jim Alexander at the Judicial Commission regarding this issue. The Code of Judicial Ethics would restrict personal activities of ALJs. ALJs are not elected officials, and the opinion

of at least one Supreme Court Justice is that only elected judges should be subject to the Judicial Code. However, there is a model code for ALJs that contains decorum and demeanor provisions that could become part of the Department work rules. Mr. Bagin indicated that management's concern revolved around demeanor, attitude and bias in the hearing room. ALJs should not be told how to rule in individual cases, however; sometimes comments are made which lead a party to believe they have not received a fair hearing. Mr. Bagin indicated that if the Department gives its assurance that this issue will be addressed, then no specific proposal by the Council would be needed. Ms. Huntley-Cooper indicated that Division management has had some discussions concerning this issue and they are evaluating ways to obtain feedback on ALJ demeanor and performance. Mr. Kent indicated that he has been at administrative hearings where there has been inappropriate conduct by the ALJ, but he has not attended any worker's compensation hearings. This is a problem that needs to be addressed. Mr. Bagin suggested that the ALJ must also disclose any conflicts. Mr. O'Malley clarified that there is no statutory right of substitution of ALJs. On occasion if there is a request, for certain reasons the case may be assigned to another ALJ, such as an appeal remand by the Labor and Industry Review Commission. However, an individual ALJ is entitled to recuse himself/herself from individual cases. There have been a few complaints on ALJ demeanor, but the parties do not want management to approach the ALJ. There are current DWD work rules that the Department can use to discipline ALJs if the conduct is egregious. The Department is limited by civil service rules; the ALJs are union members. By and large, the ALJs work hard and have a heavy caseload. The Code of Judicial Ethics would impose severe restrictions on personal activities including precluding the private practice of law and participation in political activities. If a party is aggrieved by some conduct by an ALJ, they can bring it to Mr. O'Malley's attention. The complaint will be investigated and some action will be taken. Part of an ALJs pay is based on merit. If there is inappropriate conduct, pay can be reduced to some extent. Ms. Huntley-Cooper emphasized that a formal complaint must be presented to the Department with specific case information. Mr. Mitchell commented that he is open to complaints and concerns raised by parties about staff. Sometimes it is difficult for an ALJ to keep control of a hearing. Problems can be informally discussed with an ALJ. The Department should be given the opportunity to address the problem through work rules. The parties have to be willing to file a complaint. Mr. Kent emphasized that some behaviors can not be tolerated. The ALJ must not display bias or have an obvious personal relationship with one of the lawyers. LIRC only reviews the record of a hearing and some behaviors are not documented on the record. Mr. Kent indicated that the Department needs standards of conduct. The Council agreed that the Department should address this problem internally.

Regarding management proposal #2, the Department is currently working on a standard medical release form. This also addresses Management proposal #3.



The Council agreed that Management proposals #2, 3 and 5 were not necessary once the Department finalized the medical release form. Mr. Newby indicated in regard to Management proposal #4 that the Legislature recently passed a law regarding a uniform copying rate. Mr. Weir clarified that that one year ago the Legislature enacted a law to provide for reasonable copying charges, but the State has not yet developed rules implementing the statute.

The Council agreed to table discussion of the rest of the Management proposals and the Labor proposals until the next meeting.

**5. Correspondence:** Mr. Conway indicated that Attorney John Edmondson suggested that the Department post the proposals on its website. Mr. O'Malley explained that after the agreed bill passes, the Department's plain language summary is posted on the website. The Council agreed that it was too late this year to post the proposals, but in the future the proposals should be posted on the website.

Mr. Conway indicated that the Wisconsin Nurses Association had also submitted written correspondence. Mr. Newby indicated that in talking further with the nurses when the Council adjourned briefly, the nurses are not concerned with whether they are able to make disability determinations. They are more concerned about getting their bills paid. The Council is in agreement that APNPs and PAs should be paid, but the Council was not prepared to delve into scope of practice issues. Mr. Bagin commented that perhaps APNPs and PAs could be defined in the statute in terms comparable to dentists; they can treat injured workers but can not render opinions on disability. The Council members were in agreement with that concept.

**6. Adjournment:** Discussion on all agenda items concluded and the meeting was adjourned. The next meeting date is June 16, 2003 at 9:00 a.m. The goal is to complete action on all proposals. The meeting will start with a caucus.